EX PARTE OR LATE FILED

Bell Atlantic Network Services, Inc.
1320 N. Courthouse Road, 8th Floor
Arlington, VA 22201
Tel: (703) 974-7699
Fax:(703) 974-0259

Jennifer L. Hoh
Legal Department

June 18, 1999

BY MESSENGER
Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
The Portals
445 12th Street, SW
Washington, DC 20554

Re: GTE-Bell Atlantic Merger, CC Docket No. 98-184
SBC-Ameritech Merger, CC Docket No. 98-141

Dear Ms. Salas:

Enclosed herewith are 13 corrected copies of the June 17, 1999 ex parte filed by Bell Atlantic in the above-captioned proceedings. We discovered last evening that the cover letter filed with the Commission yesterday was incorrectly dated April 17, 1999. Please substitute these corrected copies for the ones filed yesterday. We apologize for any inconvenience caused by this incident.

Thank you for your attention to this matter. If you should have any questions please do not hesitate to call me at (703) 974-7699.

Sincerely,

Jennifer L. Hoh

Encl.
cc: C. Wright
W. Rogerson
D. Stockdale
M. Carey
M. Kende
T. Troung
J. Lanning

Bell Atlantic Network Services, Inc.
1320 N. Courthouse Road, 8th Floor
Arlington, VA 22201
Tel: (703) 974-7699
Fax:(703) 974-0259

Jennifer L. Hoh
Legal Department

June 17, 1999

BY MESSENGER
Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
The Portals
445 12th Street, SW
Washington, DC 20554

Re: GTE-Bell Atlantic Merger, CC Docket No. 98-184
SBC-Ameritech Merger, CC Docket No. 98-141

Dear Ms. Salas:

Please place the attached letter from John Thorne to Thomas Krattenmaker in the public record for the above-referenced proceedings.

For your convenience, an original and twelve copies of this letter are enclosed.

Thank you for your attention to this matter. If you should have any questions please do not hesitate to call me at (703) 974-7699.

Sincerely,

Jennifer L. Hoh

Encl.
cc: C. Wright
W. Rogerson
D. Stockdale
M. Carey
M. Kende
T. Troung
J. Lanning

Bell Atlantic
1320 North Court House Road
Eighth Floor
Arlington, VA 22201
703 974-1600 Fax 703 974-0775
E-Mail: 74577.2026@compuserve.com

John Thorne
Senior Vice President & Deputy General Counsel

June 17, 1999

By Hand

Mr. Thomas G. Krattenmaker
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

Re: Response to Robert Bork's April 7, 1999 Memorandum

Dear Tom:

The Justice Department has now approved both the SBC-Ameritech and the Bell Atlantic-GTE mergers, subject only to certain conditions related to wireless properties. Those approvals are inconsistent with both of Judge Bork's theories. In particular, the Department necessarily has found no "potential competition" basis for concluding that the mergers "may substantially lessen competition" in any wireline market. Nor has the Department concluded that the mergers "may substantially lessen competition" in local-services markets by reducing regulatory benchmarks as one tool for determining the appropriate implementation of statutory requirements for ILEC assistance to new competitors. The Department's approvals, notably, came after months of detailed factual investigation into the actual real-world characteristics of the relevant markets. Judge

Bork's broad theories are no substitute for the empirically well-grounded conclusions of the Department.

Potential Competition.

A good deal of Judge Bork's discussion of potential competition focuses specifically on claims that SBC and Ameritech had plans to enter each others' local-services markets. Judge Bork properly makes no such claim with respect to Bell Atlantic and GTE. Insofar as his discussion is relevant to Bell Atlantic and GTE, Judge Bork seems to make two arguments: first, he seems to suggest a legal standard where a merger may be condemned without meeting the usual demand for a nonconjectural factual basis for finding a distinctive loss of competitive forces and no countervailing efficiencies; second, when he seems to accept governing standards and focuses briefly on characteristics of the markets at issue, he simply mentions in passing a couple of factors that he suggests inherently make ILECs uniquely likely and important potential entrants. Neither argument has merit.

Both of Judge Bork's suggestions are inconsistent with the Commission's rulings. The Commission's approvals of the SBC-Pactel, Bell Atlantic-NYNEX, and SBC-SNET mergers are flatly inconsistent with any suggestion that an incumbent LEC, by virtue of large market share, is barred from merging with another incumbent LEC in another area

on the theory that the latter is, inherently or otherwise, a non-fanciful potential entrant. More generally, Judge Bork's suggestions are incompatible with the Commission's articulated standards–not just its insistence on considering the positive benefits of such a merger, but the competitive-analysis standards themselves. Thus, in accord with the recognition that ILEC-ILEC mergers have carried (and since borne out) the promise of significant economic benefits, the Commission has declined to interpose itself where it could not find, on a concrete and nonconjectural analysis of particular markets and classes of customers and business plans, that one of the firms would in the near term have entered the other's market (absent the merger) *and* that such entry would not and could not be matched (in scale or targeted customers or other competitively significant aspect) by more than a few other comparable new competitors. *See SBC-SNET*, 13 FCC Rcd. 21,292 (Oct. 15, 1998), at ¶¶ 15-19; *MCI/WorldCom*, 13 FCC Rcd. 18,025 (Sept. 14, 1998), at ¶¶ 15-22; *AT&T-TCG*, 13 FCC Rcd. 15,236 (July 21, 1998), at ¶¶ 15-16; *Bell Atlantic-NYNEX*, 12 FCC Rcd. 19,985 (Aug. 14, 1997), at ¶¶ 7, 37; *SBC-PacTel*, 12 FCC Rcd. 2624 (Jan. 31, 1997), at ¶¶ 24-27.

Judge Bork neither discusses the Commission's approvals of prior ILEC-ILEC mergers nor justifies any relaxation of such necessary preconditions for any finding of economic harm, which are well recognized in judicial and government agencies' antitrust

analysis of "potential competition" objections to mergers. *See Antitrust Law Developments* 342-350 (4th ed. 1997).[1] Even where an incumbent firm has a "monopoly share," a merger cannot be found to harm future competition unless the merger partner would have made a substantial, otherwise-unavailable contribution to the competitive forces in the marketplace, a conclusion that cannot be drawn without considering not just whether entry would occur, but when, at what scale, through what means (resale, building, etc.), and in what market segments, and what other competitors there would or could be at the relevant times providing the relevant services, etc. Nor has Judge Bork recognized the inherent difficulties of making all of *those* required predictions (even when the incumbent has a high market share)–difficulties that have led to the profoundest caution in entertaining (and regularly rejecting) challenges to mergers on an actual-

[1]Unlike Judge Bork, courts and agencies have recognized the distinction between situations where a potential entrant is perceived as such by the market incumbents, and affects current price because of that perception, and situations where such a perception, and hence such a present effect, is lacking. Although Judge Bork seems to suggest otherwise, it is clear that the Supreme Court and lower courts have expressly reserved the validity of the latter, "actual potential competition," doctrine under Section 7 of the Clayton Act. *See Antitrust Law Developments* 346 (4th ed.) ("The Supreme Court has twice expressly left open whether a merger may violate Section 7 under the actual potential competition theory alone."); *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 625, 639 (1974).

potential-competition basis.[2] Indeed, the underlying difficulties of prediction are at their greatest in a highly unstable industry like telecommunications where change is rampant and its form unpredictable,[3] and any justification for relying on past market shares is at its weakest, where entrants are flooding in with massive regulatory assistance and the only thing that is certain is that the past high market shares are an poor predictor of the future. Finally, Judge Bork takes no account of the need for a sound basis for a prediction of competitive harm when the benefit side of the merger analysis is so weighty, as in a case like the Bell Atlantic-GTE merger, which not only promises substantial cost savings but is obviously designed to help the companies, and the market, better meet rapidly changing customer demands.

Not surprisingly in light of the accepted minimal conditions elaborated by the Commission, the courts, and the antitrust agencies, the commentary relied on by Judge

---

[2]In various proceedings, actual company-adopted plans of entry have been required. The Commission has not blocked any merger on these grounds. And in the courts, there does not appear to be any successful contested challenges to mergers based solely on the preservation of a nonperceived potential competitor.

[3]Journalist Mike Mills, upon completing his 5-year stint covering telecommunications for *The Washington Post*, recently wrote: "This is what has been the most fun about covering telecommunications: As soon as you think you can predict it, something unforeseen comes shooting out of the blue, upending everyone's plans." M. Mills, "A Look Back in Wonder," *The Washington Post*, Business Section 25, at 26 (Apr. 19, 1999).

Bork does not support any extreme potential-competition theory. Judge Bork principally relies on selected sentences from one brief subsection of III P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 701d, at 135, 136 (rev. ed. 1996), that undertakes neither an analysis of the cases and agency positions nor a full-scale analysis of the relevant issues–analyses reserved for a later extended part of the treatise (V P. Areeda & D. Turner, *Antitrust Law* ¶¶ 1123 et seq. (1980); P. Areeda & H. Hovenkamp, *Antitrust Law* ¶¶ 1116'-1125', at 267-80 (1998 Supp.)). The brief early discussion itself seems to reject any potential-competition objection in the situation presented by the Bell Atlantic-GTE merger: "[w]here the acquired firm [potential competitor] is neither unique nor already decided on entry, speculation becomes excessive." ¶ 701d, at 136. Even when it says that "[t]he acquisition of any firm that has the economic capabilities for entry and is a more-than-fanciful possible entrant is presumptively anticompetitive," it not only notes that efficiencies can outweigh the presumption but, in fact, states that the presumption itself does not apply when "the acquired firm [potential competitor] is no different in these respects from many other firms." *Id.* And "many" is precisely the term the same treatise uses, in the fuller discussion of potential-competition analysis, to mean: three other comparable potential competitors is presumptively enough to defeat any objection, and six is certainly enough. ¶ 1123a; *see* ¶ 1123' (1998 Supp.). Judge Bork's principal

authority thus ultimately calls for precisely the kind of cautious inquiry into near uniqueness of the potential competitor and its actual pre-merger plans that this Commission and the courts and enforcement agencies have undertaken.

Other authorities are no more supportive. Professor Hovenkamp, in his own independent treatise, expressly calls for abolition of the actual-potential-competition doctrine. H. Hovenkamp, *Federal Antitrust Policy* § 13.4b, at 512-13 (1994). Then-Professor Posner likewise recommended abandonment of the doctrine of potential competition. R. Posner, *Antitrust Law* 123 (1976).[4] And, in his own book, Judge Bork states as three necessary conditions for blocking a merger of an outside firm with an incumbent that has even more than a 70% share: "the outside firm is a probable entrant by internal growth if the merger is disallowed; there are *no* other equally probable entrants;

---

[4]Judge Bork cites a paragraph in Professor Posner's book in which, having recommended abandonment of potential-competition analysis because of its undue speculativeness, he anticipates and responds to the suggestion that this might be odd given that a proper notion of supply-side substitution as a part of market definition incorporates "potential competitors"–if essentially equivalent to current market participants–into the market. R. Posner, *supra*, at 124. Posner's response is to note that different inquiries are involved. In evaluating supply side substitution, there is no need to look to a firm's unexecuted plans, the firm's other opportunities, unique competitive contributions the firm's hypothesized entry might make, etc. The inquiry instead involves relatively workable notions of technological substitution of supply capacity. Professor Posner thus flatly rejects any merger rule like that suggested by Judge Bork, which would turn on its head Professor Posner's effort to reduce the speculative reaching for mere potentialities as grounds for blocking mergers, which must be analyzed on concrete facts for nonconjectural threats of economic harm.

and entry is sufficiently difficult that restriction of output is possible." R. Bork, *The Antitrust Paradox* 260 (1978) (emphasis added).

Once any suggestion of an altered standard and the facts peculiar to SBC-Ameritech are set aside, Judge Bork has almost nothing to say that could support the required nonconjectural finding of competitive harm (and no countervailing efficiencies), much less anything new. Indeed, he sets forth no analysis of the large volume of evidence–in the record of this proceeding and available from numerous other sources–about what is today happening in the marketplace, including what the large number of firms (wireline, wireless, cable, etc.) are actually doing to provide particular services (voice, data, etc.) to particular classes of customers (business, residential, etc.) and what the merger partners could soundly be predicted to do (enter at all? serve what customers? resell or build?) if they did not merge. Nor does Judge Bork give any consideration to the large benefits of the merger of Bell Atlantic and GTE: he ignores the compelling synergies of geographic reach and customer bases and complementary services; he ignores the dramatic changes in customer demand and available alternatives; and he ignores the experience of substantial proven savings from the earlier Bell Atlantic mergers.

Judge Bork also tries to distinguish the incumbent LECs from other potential entrants into each others' territory based on the assertion that existing switches could readily be used to serve customers up to 125 miles away. But, even aside from the unsuccessful argument on this score in the Bell Atlantic-NYNEX merger, Judge Bork says nothing about the obvious facts that are crucial to any claim of distinctive competitive significance from such "nearby" switches. Thus, even if having a switch within that range were significant, it is anything but distinctive: the record establishes that CLECs have deployed no fewer than 180 switches in Bell Atlantic's region alone and that fully 100% of the GTE and Bell Atlantic customers in Pennsylvania and Virginia are within 125 miles of at least 10 other companies' switches. Judge Bork ignores this fact. Nor does he consider whether GTE's or Bell Atlantic's switches have available capacity, or how the economics of "extending" a switch through a remote terminal compare with the economics of installing a small (expandable) new switch closer to customers, much less how significant a cost factor switches are for a new entrant. The 125-mile proposition, even if accepted, is analytically worthless in isolation.

In addition, Judge Bork makes passing reference to expertise, economic capability, and brand name, reliance on which was rejected in the previously approved ILEC-ILEC mergers. As the Commission knows, expertise is widely available to CLECs–from outside sources and, indeed, from the hiring of personnel away from incumbents (as has

widely occurred). Economic capability is likewise a red herring–not just because of the massive resources of CLECs like AT&T, but also because even startup CLECs have experienced no difficulty raising capital. As for brand name, whose importance is an empirical question, Judge Bork refers to no evidence whatever that brand name is of material competitive significance for any relevant class of customers where entry could be predicted to occur (the Commission has already indicated its unimportance for larger customers), let alone evidence about the particular brand-name importance of Bell Atlantic or GTE.

Finally, Judge Bork refers to alleged benefits to all CLECs from the merger partners' supposed participation in negotiations for interconnection agreements with each other absent a merger. This argument has also already been rejected, and it posits the most attenuated connection to any actual competitive effects, supposing that one ILEC might more successfully make demands of an incumbent than any of dozens of others CLECs. Even if one assumed *arguendo* that an ILEC could make a special contribution to interconnection negotiations, such participation is more, not less, likely to occur if the Bell Atlantic-GTE merger is approved, because that merger greatly increases the likelihood and scale of out-of-region entry–and hence any likelihood of making particular demands in such negotiations. Moreover, there is no serious basis for a claim of a special contribution to negotiations, given the number of interconnection agreements already in

force, the substantial expertise of CLECs (much acquired by hiring ILEC personnel), and the number of other independent ILECs–some, like Sprint, owned by important CLECs–from which any needed information can be drawn.

Benchmarks

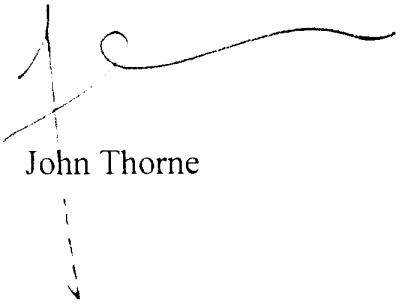
Judge Bork, based on anecdotes reported to him by AT&T, argues that approval of both the SBC-Ameritech and Bell Atlantic-GTE mergers would reduce the number of benchmarks available for determining what is technically feasible and what costs are reasonable in matters affecting CLEC dependence on ILEC facilities and assistance. The foundation for this remarkable leap is itself dubious: a list of nine one-sided anecdotes concerning the inevitable disputes about the implementation of the new 1996 Act standards. But Judge Bork does not purport to have examined the full set of facts surrounding even the particular allegations he recounts, much less the detailed responses to a long list of specific allegations already submitted by Bell Atlantic and GTE, or the facts surrounding other disputes in which AT&T and other CLECs made illegitimate (*e.g.*, unnecessary, factually infeasible, free-riding) demands on ILECs. Nor has he studied the nature of the tasks involved in, or the record of, meeting overwhelming and costly demands for access and assistance, or Bell Atlantic's leading role in meeting those demands, or considered the major added incentive from Bell Atlantic's need to obtain and then retain permission to compete in the long-distance business. Nor has Judge Bork

segregated disputes about "facts" (the only ones, as he acknowledges, that are relevant to his argument) from disputes about value/policy judgments, such as how much security, safety, or reliability risk it is worth bearing. In short, Judge Bork adds nothing to the foundation for the "benchmark" claims, namely, that there is a significant problem of illegitimate deficiencies in ILEC assistance to CLECs, let alone a problem involving factual matters to which benchmarks are even logically relevant.

Judge Bork likewise furnishes no basis for the Commission to leap from this foundation to draw the suggested conclusion of blocking the Bell Atlantic-GTE merger. The required chain of reasoning is remarkable for its implausibility. The supposed loss to competition would require that there will continue to be a significant number of factual issues for which Bell Atlantic and GTE would serve as benchmarks for each other, for which other benchmarks are unavailable (from other ILECs, including other Bell companies, Sprint, Cincinnati Bell, and various other independents), for which other regulatory tools such as requirements of treating CLECs the same as ILEC affiliates and simple direct investigation and economic incentives do not furnish the needed information, and the result must be to create a marginal decrease in regulatory tools even after taking into account the increase in benchmarks supplied by the new ILEC-ILEC competition hastened by the merger and by the rapid increase in competition and number of ILEC-CLEC interactions. Moreover, even if there were such a marginal diminution in

regulatory tools for certain issues, the issues for which this decrease occurs must be ones for which regulatory checks remain vital in light of fast-developing competition, and the issues must, in number and character and the time in the future when they arise, be so significant to the state of competition that the supposed marginal decrease in one kind of regulatory tool significantly injures competition at that time. With all of that, finally, the supposed indirect future marginal adverse effect on future competition must be found so significant that it could justify foreclosure of the undeniable large-scale competitive benefits of the Bell Atlantic-GTE merger–benefits that Judge Bork does not even discuss.

Best regards,



John Thorne

Thomas Krattenmaker
Federal Communications Commission
The Portals
445 12th Street, SW
Washington, DC 20554

202-418-2042

Christopher Wright
Office of the General Counsel
The Portals
445 12th Street, SW
Room 8C-723
Washington, DC 20554

202-418-1700

Michael Kende
Policy and Program Planning Division
Common Carrier Bureau
The Portals
445 12th Street, SW
Room 5C-225
Washington, DC 20554

202-418-7512

To-Quyen Truong
Policy and Program Planning Division
Common Carrier Bureau
The Portals
445 12th Street, SW
Room 5C-311
Washington, DC 20554

202-418-1941

Don Stockdale
Common Carrier Bureau
Federal Communications Commission
The Portals
445 12th Street, SW
Room 5C-345
Washington, DC 20554

202-418-1500

William Rogerson
Office of Policy and Planning
Federal Communications Commission
The Portals
445 12th Street, SW
Washington, DC 20554

202-418-2040

Jeff Lanning
The Portals
445 12th Street, SW
Room 8C-723
Washington, DC 20554

202-418-1700

Sharon Diskin
The Portals
445 12th Street, SW
Room 8C-723
Washington, DC 20554

202-418-1700

Michelle Carey
Common Carrier Bureau
Federal Communications Commission
The Portals
445 12th Street, SW
5th Floor
Washington, DC 20554

202-418-1557